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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/590,780	10/10/2006	**Janez Kerc**	029489-00023	1166

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EXAMINER	
ARNOLD, ERNST V	

ART UNIT	PAPER NUMBER
1616	

NOTIFICATION DATE	DELIVERY MODE
03/18/2010	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

DCIPDocket@arentfox.com
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Office Action Summary	Application No.	Applicant(s)	
	10/590,780	KERC ET AL.	
	Examiner	Art Unit	
	ERNST V. ARNOLD	1616	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *11/23/09*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-21* is/are pending in the application.

4a) Of the above claim(s) *1-12,15 and 16* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *13,14 and 17-21* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Claims 1-12, 15 and 16 have been withdrawn. Claims 13, 14, and 17-21 are under examination. Applicant's amendments have necessitated a new ground of rejection. Accordingly, this Action is FINAL.

Please note that the Examiner does not process petitions and that Applicant should contact the Petitions Office for further information.

Withdrawn rejections:

Applicant's amendments and arguments filed 11/23/09 are acknowledged and have been fully considered. Any rejection and/or objection not specifically addressed below is herein withdrawn. Claims 13 and 20 were rejected under 35 U.S.C. 102(b) as being anticipated by Dempski et al. (US 4173626). Applicant has amended claim 13 to overcome this rejection. Accordingly, it is withdrawn.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 13, 14, and 17-21 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Pflaum (US 6740775) in view of Kofler et al. (US 6511972).

Applicant claims:

> (Currently Amended) A **stabilized** pharmaceutical composition obtainable by a process comprising preparing a wet ~~phase~~ **granulation phase comprising** ~~an active pharmaceutical ingredient~~, **pravastatin sodium,** microcrystalline cellulose and a liquid, and then removing the liquid, wherein in at least the ~~wet~~ **granulation** phase, the weight ratio of ~~active pharmaceutical ingredient~~ **pravastatin sodium** to microcrystalline cellulose is greater than 1.0 and/or the weight ratio of ~~active pharmaceutical ingredient~~ **pravastatin sodium** to liquid is greater than 1.0.

Determination of the scope and content of the prior art

(MPEP 2141.01)

Pflaum teaches pharmaceutical compositions of the sodium salt of pravastatin in a crystalline form and methods of making them (claims 1-19). The X-ray diffraction pattern in Figure 2; shown below:

Figure 2

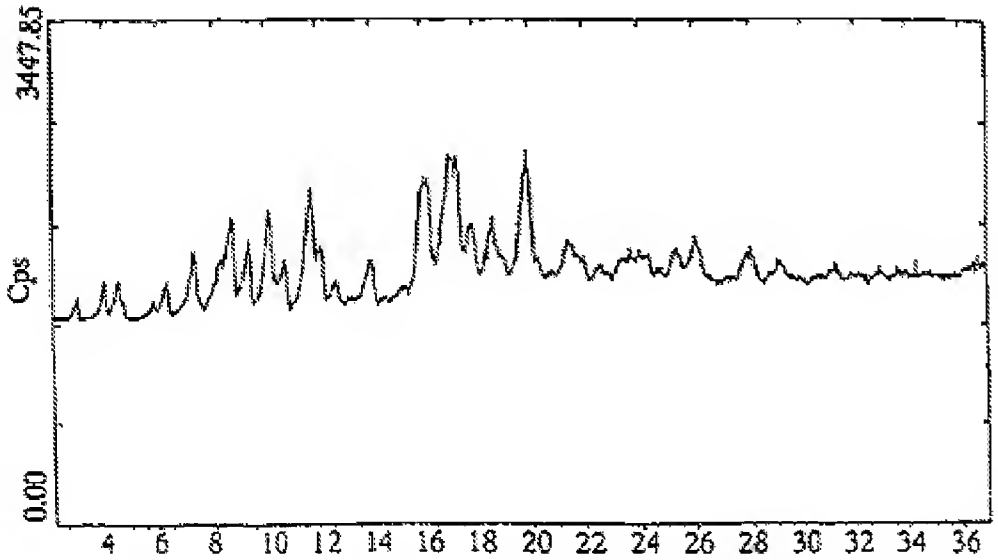

FIG. 2 is a diffractogram of crystals of the sodium salt of pravastatin prepared according to Example 2 of the present invention, which are scanned on the X-ray powder diffractometer within 2 to 48° 2Θ range with a 0.035° 2Θ step and an integration time of 1 second/step.

Applicant teaches that the instantly claimed process produces crystalline pravastatin sodium substantially similar to figure 2 above (original claim 9) and thus has the essentially same X-ray diffraction pattern with significant peaks and half value widths which equates the prior art product with that which is instantly claimed.

Tablets are taught (column 5, lines 23-25 and column 6, lines 3-9). Microcrystalline cellulose is taught as a filler (column 5, lines 27-29).

Pflaum teaches methods of making the pravastatin in the presence of ethanol or methonal in column 4, lines 26-52 reproduced below:

> The process for the preparation of crystals according to the present invention as described above comprises the following steps:
>
> (a) Providing a solution containing pravastatin and sodium cations in a lower aliphatic alcohol. This is suitably carried out by dissolution of an solid and/or amorphous sodium salt of pravastatin in a lower aliphatic alcohol having preferably 1 to 4 carbon atoms. More preferably, the alcohol used for the dissolution of pravastatin sodium is ethanol or methanol. The best crystallization results have been achieved when preparing a solution of pravastatin sodium in methanol.
>
> (b) Adding ethyl acetate into the alcoholic solution, preferably while the alcoholic solution obtained in step (a) is stirred continually. The addition of ethyl acetate into the alcoholic solution of pravastatin sodium is preferably carried out slowly, while the addition may be continuously or stepwise.
>
> (c) Cooling the resulting alcohol/ethyl acetate mixture; and
>
> (d) Crystallizing the sodium salt of pravastatin.
>
> In step (d) from the cooled mixture crystals of the sodium salt of pravastatin, which preferably have a colorless or pale yellow appearance and are in the form of needles or radiating clusters, are formed.
>
> Additionally, the crystals obtained by this process may preferably be filtered, ethyl acetate washed and dried.

Pflaum teaches a process of preparing the sodium salt of pravastatin using open language (claim 6).

Kofler et al. teach microcrystalline cellulose such as Avicel PH 112 having a particle size from 20 to 100 microns for capsule and tablet formulations (column 2, lines 10-15).

Ascertainment of the difference between the prior art and the claims

(MPEP 2141.02)

1. The difference between the instant application and Pflaum is that Pflaum do not expressly teach a stabilized pharmaceutical composition obtainable by a process comprising preparing a wet granulation phase and adding microcrystalline cellulose that has an average particle size of from 10 to 200 microns and a weight ratio of pravastatin to microcrystalline cellulose of greater than 1 and/or the weight ratio pravastatin sodium to liquid is greater than 1.0. This deficiency in Pflaum is cured by the teachings of Kofler et al.

Finding of prima facie obviousness

Rational and Motivation (MPEP 2142-2143)

1. It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to add microcrystalline cellulose that has an average particle size of from 10 to 200 microns and a weight ratio of pravastatin to microcrystalline cellulose of greater than 1 and/or the weight ratio pravastatin sodium to liquid is greater than 1.0 to obtain a stabilized pharmaceutical composition, as suggested by Kofler et al., to the composition of Pflaum and produce the instant invention.

One of ordinary skill in the art would have been motivated to do this because: 1) Pflaum teaches adding microcrystalline cellulose to the formulation but simply does not name a brand or particle size and the art of Kofler et al. teaches commercially available

sources of microcrystalline cellulose within the particle size claimed and 2) the instant claims read on a product by process. Please note that in product-by-process claims, once a product appearing to be substantially identical is found and a 35 U.S.C. 103 rejection [is] made, the burden shifts to the applicant to show an obvious difference. MPEP 2113. This rejection under 35 U.S.C. 103 is proper because the "patentability of a product does not depend on its method of production." *In re Thorpe*, 227 USPQ 964, 966 (Fed. Cir. 1985).

With regards to the weight ratio, it is the position of the Examiner that this is merely a matter of routine optimization. The amount of a specific ingredient in a composition is clearly a result effective parameter that a person of ordinary skill in the art would routinely optimize. Optimization of parameters is a routine practice that would be obvious for a person of ordinary skill in the art to employ. It would have been customary for an artisan of ordinary skill to determine the optimal amount of each ingredient needed to achieve the desired results. Thus, absent some demonstration of unexpected results from the claimed parameters, the optimization of ingredient amounts would have been obvious at the time of applicant's invention. The composition would be intrinsically stabilized against converting into one exhibiting peaks having half value widths of significant peaks above 2 degree 2 Theta in the absence of evidence to the contrary.

With regard to the "wet phase" limitation, the stabilized composition is stabilized in wet or dry phase because such stabilization is intrinsic no matter the phase.

In light of the forgoing discussion, the Examiner concludes that the subject matter defined by the instant claims would have been obvious within the meaning of 35 USC 103(a).

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

Response to argument:

Applicant asserts on the one hand that Pflaum is not relevant to obviousness and the Pflaum is not concerned with any particular formulation of pravastatin sodium and that it is Applicant's discovery that a specific formulation made in a specific way results in a stable pravastatin polymorph. Respectfully the Examiner cannot agree for the following reasons. First, it is difficult for the Examiner to reconcile the fact that in Applicant's own examples where 4 g pravastatin and 2 g avicel produces an XRPD results with a combination of polymorphs LEK and D, while another example with 4 g pravastatin and 2 g avicel results only in form LEK. Form LEK is obtained with 6 g pravastatin to 9 g ethanol and form LEK is obtain with 6 g pravastatin and 3 g ethanol. This result means that the ratio of active to liquid is irrelevant. Confusingly, form D is obtained with 3 g pravastatin and 10 g ethanol but form LEK is obtained with 6 g pravastatin to 9 g ethanol. Only when equal amounts of microcrystalline cellulose are used is the form LEK consistently obtained but even that is not true for all examples:

6 g **Avicel** + 6 g pravastatin Na + 3 g ethanol, drying in vacuum at RT	form LEK
6 g **Vivapur** + 6 g pravastatin Na + 3 g ethanol, drying in vacuum at RT	form LEK
6 g **Microcel** + 6 g pravastatin Na + 3 g ethanol, drying in vacuum at RT	form LEK
6 g **Avicel** + 6 g pravastatin Na + 7 g ethanol, drying in vacuum at RT	form LEK + form D

Secondly, ***the form "LEK" is admitted by Applicant to be the same polymorph form disclosed in the cited reference***. From the instant specification [0003]: "For instance, crystalline pravastatin sodium is disclosed in U.S. Pat. No. 6,740,775 ("Form LEK")". Obviously if the cited reference is making the same polymorph it is stable! Applicant is making the same polymorph form LEK as the cited reference. The Examiner reminds Applicant that the "patentability of a product does not depend on its method of production." *In re Thorpe*, 227 USPQ 964, 966 (Fed. Cir. 1985).

No unexpected results have been shown. Applicant's arguments are not persuasive and the rejection is maintained.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 13, 14, and 17-21 remain/are rejected under 35 U.S.C. 103(a) as being unpatentable over Keri et al. (WO 01/43723) in view of Kofler et al. (US 6511972).

Applicant claims:

(Currently Amended) A **stabilized** pharmaceutical composition obtainable by a process comprising preparing a wet ~~phase~~ **granulation phase comprising** ~~an active pharmaceutical ingredient~~, **pravastatin sodium,** microcrystalline cellulose and a liquid, and then removing the liquid, wherein in at least the wet **granulation** phase, the weight ratio of ~~active pharmaceutical ingredient~~ **pravastatin sodium** to microcrystalline cellulose is greater than 1.0 and/or the weight ratio of ~~active pharmaceutical ingredient~~ **pravastatin sodium** to liquid is greater than 1.0.

Determination of the scope and content of the prior art

(MPEP 2141.01)

Keri et al. teach novel forms of pravastatin sodium, methods of making and methods of using the pravastatin sodium (Abstract and claims 1-203). Tablets are disclosed and may contain diluents such as microcrystalline cellulose (page 13, lines 4-7). Capsules are also taught (page 13, lines 24-27). With regard to the significant peaks having half-value widths below 2 degrees 2 theta, the U.S. Patent Office is not equipped with analytical instruments to test prior art compositions for the infinite number of ways that a subsequent applicant may present previously unmeasured characteristics. When as here, the prior art appears to contain the exact same ingredients and applicant's own disclosure supports the suitability of the prior art composition as the inventive composition component, the burden is properly shifted to applicant to show otherwise.

Kofler et al. teach microcrystalline cellulose such as Avicel PH 112 having a particle size from 20 to 100 microns for capsule and tablet formulations (column 2, lines 10-15).

Ascertainment of the difference between the prior art and the claims

(MPEP 2141.02)

1. The difference between the instant application and Keri is that Keri do not expressly teach adding microcrystalline cellulose that has an average particle size of from 10 to 200 microns and a weight ratio of pravastatin to microcrystalline cellulose of greater than 1 and/or the weight ratio pravastatin sodium to liquid is greater than 1.0 to obtain a stabilized pharmaceutical composition. This deficiency in Keri is cured by the teachings of Kofler et al.

Finding of prima facie obviousness

Rational and Motivation (MPEP 2142-2143)

1. It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to add microcrystalline cellulose that has an average particle size of from 10 to 200 microns and a weight ratio of pravastatin to microcrystalline cellulose of greater than 1 and/or the weight ratio pravastatin sodium to liquid is greater than 1.0 to obtain a stabilized pharmaceutical composition, as suggested by Kofler et al., to the composition of Keri and produce the instant invention.

One of ordinary skill in the art would have been motivated to do this because: 1) Keri teaches adding microcrystalline cellulose to the formulation but simply does not name a brand or particle size and the art of Kofler et al. teaches commercially available sources of microcrystalline cellulose within the particle size claimed and 2) the instant claims read on a product by process. Please note that in product-by-process claims, once a product appearing to be substantially identical is found and a 35 U.S.C. 103 rejection [is] made, the burden shifts to the applicant to show an obvious difference. MPEP 2113. This rejection under 35 U.S.C. 103 is proper because the "patentability of a product does not depend on its method of production." *In re Thorpe*, 227 USPQ 964, 966 (Fed. Cir. 1985).

With regards to the weight ratio, it is the position of the Examiner that this is merely a matter of routine optimization. The amount of a specific ingredient in a composition is clearly a result effective parameter that a person of ordinary skill in the art would routinely optimize. Optimization of parameters is a routine practice that would be obvious for a person of ordinary skill in the art to employ. It would have been customary for an artisan of ordinary skill to determine the optimal amount of each ingredient needed to achieve the desired results. Thus, absent some demonstration of unexpected results from the claimed parameters, the optimization of ingredient amounts would have been obvious at the time of applicant's invention. The composition would be intrinsically stabilized against converting into one exhibiting peaks having half value widths of significant peaks above 2 degree 2 Theta in the absence of evidence to the contrary.

With regard to the "wet phase" limitation, the stabilized composition is stabilized in wet or dry phase because such stabilization is intrinsic no matter the phase.

In light of the forgoing discussion, the Examiner concludes that the subject matter defined by the instant claims would have been obvious within the meaning of 35 USC 103(a).

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

Response to arguments:

Applicant asserts that the instant invention can be distinguished over the cited art in at least three ways. The first way is the wet granulation process but this is irrelevant because the "patentability of a product does not depend on its method of production." *In re Thorpe*, 227 USPQ 964, 966 (Fed. Cir. 1985). The second way is the ratio of active ingredient to microcrystalline cellulose or the liquid which ratio should be above 1. However, it is merely a matter of routine optimization of the components taught by the references. The third way is that the predetermined ratios do not prevent the end composition from containing more microcrystalline cellulose than the pravastatin sodium as the ratio must only be observed during the wet granulation but afterwards more microcrystalline cellulose can be added. The Examiner studied Applicant's data and it seems to the Examiner that even Applicant is unsure of what ratio of ingredients

produces which polymorph given their data. Applicant's own examples where 4 g pravastatin and 2 g avicel produces an XRPD results with a combination of polymorphs LEK and D, while another example with 4 g pravastatin and 2 g avicel results only in form LEK. Form LEK is obtained with 6 g pravastatin to 9 g ethanol and form LEK is obtain with 6 g pravastatin and 3 g ethanol. This result means that the ratio of active to liquid is irrelevant. Confusingly, form D is obtained with 3 g pravastatin and 10 g ethanol but form LEK is obtained with 6 g pravastatin to 9 g ethanol. Only when equal amounts of microcrystalline cellulose are used is the form LEK consistently obtained but even that is not true for all examples and is hence 'unstable':

6 g **Avicel** + 6 g pravastatin Na + 3 g ethanol, drying in vacuum at RT	form LEK
6 g **Vivapur** + 6 g pravastatin Na + 3 g ethanol, drying in vacuum at RT	form LEK
6 g **Microcel** + 6 g pravastatin Na + 3 g ethanol, drying in vacuum at RT	form LEK
6 g **Avicel** + 6 g pravastatin Na + 7 g ethanol, drying in vacuum at RT	form LEK + form D

The Examiner reminds Applicant that 'process' claims are not under consideration. Keri teaches the same components, and polymorphs Form A, Form B, Form C, Form D, Form E, Form F, Form G, Form H, Form H1, Form I, Form J, Form K

and Form L, as claimed and stability is intrinsic to the composition in the absence of evidence to the contrary. No evidence has been presented. Applicant has not distinguished their composition form the cited art The rejection is maintained.

Applicant argues that the weight ratios of the specific ingredients is relevant to the stability of the final product, however such has been shown to be dubious at best given Applicant's own data above.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

1. Claims 13, 14, and 17-21 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 7, 14, 17, 18, 19, 25, 32, 33, and 39 of U.S. Patent No. 6680341 in view of Pflaum (US 6740775) and

Kofler et al. (US 6511972). The references of Pflaum and Kofler et al. are discussed in detail above and those discussions are hereby incorporated by reference. The instant subject matter embraces or is embraced by the copending subject matter. US 6680341 teaches stable/stabilized pharmaceutical formulations of sodium pravastatin and fillers. The disclosure encompasses all polymorphs of sodium pravastatin.

US 6680341 does not expressly teach the filler to be microcrystalline cellulose of a particular particle size and ratio with the active.

However, the art teaches using microcrystalline cellulose in sodium pravastatin formulations and the art teaches microcrystalline cellulose within the instant particle size. It would be obvious to use microcrystalline cellulose in the stable/stablized pravastatin formulations taught in 6680341 because the art suggests doing so. With regards to the weight ratio of ingredients; the amount of a specific ingredient in a composition is clearly a result effective parameter that a person of ordinary skill in the art would routinely optimize. Optimization of parameters is a routine practice that would be obvious for a person of ordinary skill in the art to employ. It would have been customary for an artisan of ordinary skill to determine the optimal amount of each ingredient needed to achieve the desired results. Thus, absent some demonstration of unexpected results from the claimed parameters, the optimization of ingredient amounts would have been obvious at the time of applicant's invention. Please note that in product-by-process claims, once a product appearing to be substantially identical is found and a 35 U.S.C. 103 rejection [is] made, the burden shifts to the applicant to show an obvious difference. MPEP 2113. This rejection under 35 U.S.C. 103 is proper

because the "patentability of a product does not depend on its method of production." *In re Thorpe*, 227 USPQ 964, 966 (Fed. Cir. 1985).

Thus, one of ordinary skill in the art would have recognized the obvious variation of the instant invention over the patent in view of the cited references.

2. Claims 13, 14, and 17-21 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 12, 13, and 17 of U.S. Patent No. 6531507 in view of Pflaum (US 6740775) and Kofler et al. (US 6511972). The references of Pflaum and Kofler et al. are discussed in detail above and those discussions are hereby incorporated by reference. The instant subject matter embraces or is embraced by the copending subject matter. US 6531507 teaches pharmaceutical formulations of sodium pravastatin and fillers. The disclosure encompasses all polymorphs of sodium pravastatin.

US 6531507 does not expressly teach the filler to be microcrystalline cellulose of a particular particle size and ratio with the active.

However, the art teaches using microcrystalline cellulose in sodium pravastatin formulations and the art teaches microcrystalline cellulose within the instant particle size. It would be obvious to use microcrystalline cellulose in the pravastatin formulations taught in US 6531507 because the art suggests doing so. With regards to the weight ratio of ingredients; the amount of a specific ingredient in a composition is clearly a result effective parameter that a person of ordinary skill in the art would routinely optimize. Optimization of parameters is a routine practice that would be obvious for a person of ordinary skill in the art to employ. It would have been customary for an artisan

of ordinary skill to determine the optimal amount of each ingredient needed to achieve the desired results. Thus, absent some demonstration of unexpected results from the claimed parameters, the optimization of ingredient amounts would have been obvious at the time of applicant's invention. Please note that in product-by-process claims, once a product appearing to be substantially identical is found and a 35 U.S.C. 103 rejection [is] made, the burden shifts to the applicant to show an obvious difference. MPEP 2113. This rejection under 35 U.S.C. 103 is proper because the "patentability of a product does not depend on its method of production." *In re Thorpe*, 227 USPQ 964, 966 (Fed. Cir. 1985).

Thus, one of ordinary skill in the art would have recognized the obvious variation of the instant invention over the patent in view of the cited references.

Response to arguments:

Applicant asserts that he Examiner has not given weight to Applicant's process by which the claimed compositions were made. Respectfully, the Examiner has given weight to the product made and it seems that no logical conclusion can be made as to what form of polymorph is going to be produced from Applicant's own data as discussed above. Applicant's data is appears to contradict itself. These arguments are not persuasive and the rejections are maintained.

Conclusion

No claims are allowed.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ernst V. Arnold whose telephone number is 571-272-8509. The examiner can normally be reached on M-F (7:15 am-4:45 pm).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Ernst V Arnold/
Examiner, Art Unit 1616